

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

CALVIN BRUCE,

Defendant.  
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OPINION AND ORDER

11-cv-672-bbc  
07-cr-57-bbc

Defendant Calvin Bruce has filed a motion for post conviction relief under 28 U.S.C. § 2255. He contends that he was denied his constitutional right to the effective assistance of counsel in two respects: (1) his lawyer failed to challenge his sentencing for possessing 50 grams or more of crack cocaine when that amount was never charged in the indictment or proven to the jury and (2) his lawyer failed to advise him he had a constitutional right to testify and in fact refused to allow him to testify.

The motion will be denied. Defendant's trial counsel had no reason to challenge defendant's sentence. The indictment returned against defendant charged him specifically with possession of 50 grams or more of crack cocaine and the jury found that he had

possessed this amount. As to his claim that counsel did not advise him of his constitutional right to testify, defendant has produced nothing to support this claim. A bare allegation does not require the court to hold an evidentiary hearing on the issue, let alone grant his motion.

### RECORD FACTS

Defendant Calvin Bruce was charged by indictment on April 20, 2007 with unlawful possession with intent to distribute 50 grams or more of cocaine base. He moved to suppress certain evidence; the motion was denied. His trial began on August 15, 2007 before District Judge John Shabaz. At trial, the government played a tape of a conversation between defendant and a Madison detective recorded after defendant had been arrested and taken into custody. (He was not taken to jail immediately but held at the Madison police department's west district office while the police conducted a consensual search at the home of defendant's girlfriend, Endia Matthews.)

When defendant was searched incident to his arrest, police recovered marijuana from his shoe and his buttocks. During the search of Matthews's house, police recovered \$2580 from a jacket belonging to defendant and more than 50 grams of cocaine base from the engine compartment of a van parked in the garage. The cocaine base was wrapped with a separate baggie containing pepper. Police found baggies with the corners cut off in the garage, the van and the kitchen.

The recorded interview took place after the house and van had been searched and the cocaine base discovered. Detective Dorothy Rietzler read defendant his rights. She asked him whether there were any large amounts of cash in Matthews's house; defendant said that he had money in a shoe box on a dresser that was intended for the light bill and the rent on Matthews's house, but no other money. After extended questioning about the source of the money and defendant's lack of employment and after Rietzler told defendant that Matthews had said she did not know about the money in her house, defendant admitted that he usually kept his cocaine base in the cushions behind a seat in his van. He confirmed that he had had about two ounces of crack cocaine in the van and that it was his custom to wrap the crack in pepper. Defendant agreed to cooperate with the police by giving them the names of his suppliers.

At trial, the government introduced evidence of the money found in defendant's pocket, the baggies with the missing corners found in the garage and in the kitchen, the crack cocaine found in the van's engine compartment, mail addressed to defendant at Matthews's address and evidence that defendant drove the van regularly. The government introduced the tape of defendant's entire conversation with Detective Rietzler and the photograph of defendant's source that defendant had initialed. The jury found the defendant guilty of the charge in the indictment and it made the specific finding that defendant had possessed 50 grams or more of cocaine base.

Defendant was sentenced on October 31, 2007. Defendant and his counsel confirmed that they had no objections to anything in the presentence report. The court found that defendant qualified as a career offender at a level 37 because he had two prior convictions for felony controlled substance offenses. However, his criminal history score was 38 because he was responsible for distribution of 3.28 kilograms of cocaine base, so he was sentenced on the basis of his criminal history score. Judge Shabaz sentenced him to the bottom of the guideline range, which was 360 months to life.

On direct appeal, the Court of Appeals for the Seventh Circuit remanded the case for re-sentencing on one ground only: to give the district court an opportunity to indicate whether it would have imposed the same sentence had it known it could depart from the 100:1 crack/powder cocaine ratio. On February 20, 2009, I resentenced defendant because Judge Shabaz was on medical leave, reducing his sentence to 324 months. Defendant took an appeal, but the court of appeals denied it. Defendant filed a petition for a writ of certiorari, which was denied on October 6, 2010. Defendant filed this timely motion for post conviction relief on September 29, 2011.

## OPINION

To succeed on a claim of ineffective assistance of counsel, a defendant must prove that his attorney's performance fell below an objective standard of reasonableness *and* that

he suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). It is not enough simply to allege ineffectiveness, a defendant must “establish the specific acts or omissions of counsel that he believes constituted ineffective assistance” and from which the court can “determine whether such acts or omissions fall outside the wide range of professionally competent assistance.” Wyatt v. United States, 574 F.3d 455, 458 (7th Cir. 2009) (citing Coleman v. United States, 318 F.3d 754, 758 (7th Cir. 2003)).

Obviously, defendant cannot succeed in showing ineffectiveness as to his attorney’s failure to challenge his sentencing on the basis of 50 grams or more of cocaine base. Defendant was charged with possessing this amount and the jury found beyond a reasonable doubt that the government had proved the charge. (He or the inmate who was helping him prepare his post conviction motion may have forgotten this fact.)

Defendant’s other contention is either that his attorney did not tell him that he had a right to testify on his own behalf at trial or refused to allow him to testify. (He alleges both.) He has not supported this contention with any evidence, which is something he must do if his claim is to proceed. Galbraith v. United States, 313 F.3d 1001, 1009 (7th Cir. 2002) (court may deny defendant’s motion when defendant has not provided any evidence of ineffectiveness, such as an affidavit from defendant or his counsel, supporting his version of counsel’s conduct); see also Fuller v. United States, 398 F.3d 644, 650 (7th Cir. 2005) (same). Of course, it is not enough for a defendant to show that his counsel was ineffective.

He must show that the ineffectiveness prejudiced him in some respect. Again, defendant has not supplied any evidence of prejudice by way of affidavit or otherwise. A “mere allegation that he would have chosen a path other than the [one he took] is insufficient by itself to establish prejudice.” Id. (citing Bethel v. United States, 458 F.3d 711, 718 (7th Cir. 2006)).

I could give defendant an opportunity to submit an affidavit supporting his claim, because he may not have understood what he had to do in order to support his motion. The fact is, however, that he was given an opportunity to submit a reply brief, together with the required affidavit, after he learned from reading the government’s response brief that such an affidavit was necessary, and he did not file anything at all. But what could defendant have added that would support his claim? A review of the government’s evidence against him shows that he had no chance of refuting that evidence by any testimony he might have given. He admitted to the police, and it was recorded on tape, that he possessed and distributed crack cocaine. The police found crack cocaine in the van he was seen driving regularly; they found baggies with corners ripped off in the van, kitchen and garage at Matthews’s residence; they found almost \$2500 in defendant’s jacket; he admitted to the police that he used pepper in an outer wrapper when wrapping cocaine for resale; and he initialed a picture of a person he said was his source of crack cocaine.

As counsel surely recognized, defendant’s chances of a guilty verdict would have been increased, not hindered, had he taken the stand. The government could have used all of his

prior statements to impeach any testimony he gave.

ORDER

IT IS ORDERED that defendant Calvin Bruce's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED for defendant's failure to show that his counsel was ineffective in any respect or that counsel's alleged ineffectiveness prejudiced defendant.

Entered this 30th day of January, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge